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No. 174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

RICHARD T. GOSSER, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY

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I. With Respect to the Court of Appeals' Failure to Give Proper Appellate Review to Jencks Act Question

No claim is made by the Government—indeed, none could be—that the Court of Appeals ever examined, or had available for examination, the so-called "witness sheets" documents which were withheld from defense counsel.

Instead, the Government claims (Br. Opp., p. 11) "it was petitioner's responsibility" to see that these documents were made available to, and examined by, the Court of Appeals. But the documents were in the sole and exclusive possession of the Government itself. And the Jencks Act, as we have pointed out (Petition, p. 13), contemplates that the documents "shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge." In the face of these obligations, neither the Government nor the Court of Appeals took the slightest step to see that the minimum requirements of fair appellate review under the Jencks Act were met.

Now that it is so clear that the appellate process contemplated by the Jencks Act has been frustrated, the Government would seek to place the full burden of this on the petitioner—instead of on the Government and the Court of Appeals, where it rightly belongs. This Court's intervention is plainly required in order to maintain the integrity of the Jencks Act's process of appellate review.

II. With Respect to the Total Withdrawal of the Entrapment Issue From the Jury

The Government's labored attempt (Br. Opp., pp. 6-8) to justify the total withdrawal of the entrapment issue from the jury helps to emphasize how fundamentally the case presented an issue for the jury.

The Government (Br. Opp., p. 7) seems to quarrel with petitioner Gosser's position (Petition, pp. 19-20) that, if the entrapment issue had been submitted to the jury, the jury might have rejected part of Mrs.

Niedomski's testimony. But surely that is a matter which the jury, not the Government, should have been the one to decide.

The Government then claims (Br. Opp., p. 7) that since (on the prosecution's theory of the case) the defendants Gosser and Pinciotti dealt with Mrs. Niedomski only through Maison,[1] the petitioner Gosser could not have been entrapped unless either (1) Maison was entrapped or (2) Maison was acting as a Government agent in entrapping Gosser and Pinciotti, and that no evidence in the record would have supported either of these inferences. But, first, the judge totally withdrew from the jury the question whether Maison was entrapped, so that we can never know what the jury would have found on that point; and whether Maison was entrapped depended, in large part, on the jury's assessment of Mrs. Niedomski's credibility. Second, to find entrapment it was not necessary for the jury to determine that Maison was a hired Government agent (we agree the record does not suggest this). The jury might equally have found entrapment if it determined that Maison, having for his own purposes voluntarily entered into a criminal conspiracy with Mrs. Niedomski, thereafter become a somewhat unwitting Government tool, or a vehicle of an entrapment scheme carefully conceived by Government agents and designed to entrap petitioner Gosser. And third, in any event the jury might well have found petitioner Gosser to have been entrapped, regardless of whether

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[1] Actually, the record does not even suggest that the petitioner Gosser himself any dealings with, or even knew, Maison. Accordingly, the Government must mean to be saying that, on the prosecution's theory of the case, Gosser dealt with Maison through Pinciotti.

the jury found that Maison had been entrapped and regardless of whether the jury found that Pinciotti had been entrapped.

Indeed, here is where the Government presses to the extreme its fundamental misconception concerning the respective roles of judge and jury. The Government claims (Br. Opp., p. 7) that if the jury had believed that petitioner Gosser did not have any knowledge of or connection with the conspiracy until the events of November 12, 1962, just before the arrests were made, then the jury "would have acquitted Gosser not on entrapment grounds but simply because he would not have been guilty of the offense charged." But the Government would be the first to assert the well-settled rule that one who joins or is brought into a conspiracy late, but before the conspiracy has terminated, nevertheless becomes guilty of the conspiracy offense charged.[2] If the jury believed that petitioner Gosser was a very late entrant into the conspiracy, and that his entry had been the product of an elaborate entrapment scheme designed by Government agents and directed to ensnaring him into the conspiracy, then surely the jury should have been permitted to acquit him on entrapment grounds. The trial judge foreclosed the jury from doing so; and the Court of Appeals agreed with the trial judge. This basic error in allocating responsibility as between the jury and the judge pervades the decisions below. It is an error calling for review and correction by this Court.

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[2] See, e.g., *Mendelson* v. *United States*, 58 F. 2d 532, 535-536 (D.C. Cir.); *Lile* v. *United States*, 264 F. 2d 278, 281 (9th Cir.); *United States* v. *Lester*, 282 F. 2d 750, 753 (3rd Cir.), certiorari denied, 364 U.S. 937; *Hernandez* v. *United States*, 300 F. 2d 114, 122 (9th Cir.).

III. With Respect to Prejudicial Cross-Examination of Reputation Witnesses

Subsequent to the filing of the petition for certiorari, the United States Court of Appeals for the District of Columbia Circuit has rendered a decision which underscores the need for, and the desirability of, further consideration by this Court of *Michelson* v. *United States,* 335 U.S. 469, as this petitioner has urged (Petition, pp. 22-25). In *Awkard* v. *United States,* No. 18723, decided June 3, 1965, the District of Columbia Circuit reversed a conviction on the ground that the trial judge had abused his discretion in permitting the prosecutor to cross-examine the defendant's character witnesses concerning the defendant's prior arrests. Judge Washington's opinion for the Court reviews the hazards of this type of cross-examination and the great risks of undue prejudice to the defendant, and holds that regardless of whether *Michelson's* force has been weakened by subsequent decisions of this Court in other areas, the need for excluding the line of cross-examination was clear in *Awkard's* case. The final three paragraphs of the Court's opinion (omitting the footnotes) show the standards applied:

> "Intimations of past crimes, especially crimes similar to the crime charged, are extremely damaging to an accused. Merely putting the question, even if the witness has no knowledge of the events adverted to, creates in the minds of the jurors the impression that the events had occurred. Cautionary instructions, copiously provided by the trial judge in this case, do not give the accused adequate protection. They cannot prevent the jury from considering prior actions in deciding whether appellant has committed the crime

charged. The courts need not rest on the assumption that juries can compartmentalize their minds and hear things for one purpose and not for another. The Supreme Court took the lead in *Jackson* v. *Denno,* 378 U.S. 368 (1964), by going behind the historic assumptions of the law of evidence and considering the psychological reality of the jury's functioning, in that case as it related to its consideration of the voluntariness of confessions.

"The use of this mode of impeachment must be closely supervised and cautiously limited. In the instant case the cited questions were clearly improper; their effect was highly prejudicial, and they did not fulfill the only purpose for which such cross-examination is admitted. The use of cross-examination of a character witness to show defendant's prior arrests has been much criticized but widely practiced. We do not reverse this long practice at this time. We do, however, urge the trial judges to confine the use of such cross-examination to those situations in which it is highly relevant to establish a character witness' reliability; and even in those situations, to exercise their discretion and exclude the cross-examination where prejudice outweighs probative value.

"In the light of these principles, the trial judge in the instant case clearly abused his discretion in permitting the prosecuting attorney to cross-examine defendant's character witnesses on appellant's prior arrests. The case is therefore reversed."

Application of the same standards to the present case of petitioner Gosser would likewise lead to reversal of the conviction.

CONCLUSION

For these additional reasons, as well as the reasons set forth in the Petition for Certiorari, certiorari should be granted.

Respectfully submitted,

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